Supreme Court, U.S.
FILED
APR 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1194

In the Supreme Court of the United States

OCTOBER TERM, 1988

ICELEAN CLARK, *et al.*,
Petitioners,
vs.
KALIMA JENKINS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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It can be of no weight to say, that the courts on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. . . . The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.

— Alexander Hamilton
The Federalist No. 78

Representative taxation and a federal judiciary limited to the adjudicative function lie at the heart of our

constitutional form of self-government. The levying of court-imposed property taxes, even as a "last resort," epitomizes "the pretence of a repugnancy" which so greatly concerned Mr. Hamilton.

Respondents treat lightly the awesome power harnessed by the lower courts in this litigation; they argue for a universal acceptance of one Circuit Court's concept of the the juridical function. However, we should not confuse idiosyncratic judicial legislation—the display of judicial WILL—with the proper exercise of Article III authority under the Constitution. "[N]o system of justice can exist without law and order, and . . . the integrity of the democratic process is more important in a self-governing republic than any specific result we could seek to reach by that process." Remarks of Sidney Hook, the Shavano Institute (May 1985), *reprinted in* S. Hook, *Between Democracy and Despotism*, Imprimis (February 1986).

No less than the integrity of our democratic process —at least the integrity of the federal judiciary's role in that process—is at stake in this case. *Does a federal trial judge have the power to order a property tax levy increase to generate revenues deemed necessary to fund a judicial remedy*? One could hardly imagine an issue of more gravity or fundamental relevance to this Court's responsibility in declaring "the sense of the law" and protecting "the integrity of the democratic process."

I.

THIS COURT HAS JURISDICTION TO REVIEW THE QUESTIONS PRESENTED BY THIS PETITION.

Petitioners concur with the State of Missouri's comprehensive response to the jurisdictional challenge submitted by Respondents and join in those arguments. *See* State Reply Br. at 2-6 (in *State of Missouri v. Jenkins*, No. 88-1150). Two points must be stressed: First, the Eighth Circuit's January 10, 1989 *nunc pro tunc* order did not confer, or attempt to confer, the jurisdiction of this Court; this order simply clarified the circumstances surrounding the rehearing process in this appeal. Second, the Eighth Circuit alone is empowered to construe Rule 35, Fed.R.App.P., and determine whether a rehearing paper[1] filed with the court "is in fact merely a petition for a rehearing, with a suggestion that the case be reheard in banc." Rule 35, Fed.R.App.P., Advisory Committee Notes. *See Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247, 250 (1953) (the appellate court under 28 U.S.C. Section 46(c) "is left free to devise its own machinery to provide the means whereby a majority may order" rehearing *en banc*).

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1. All three petitions for rehearing filed by the three groups of petitioners in these related actions, Nos. 88-1150, -1194 and -1228, were identically captioned and similarly structured. Because all three rehearing petitions were filed within ninety days following the entry of judgment, all three petitions are timely for purposes of this Court's jurisdiction under 28 U.S.C. Section 2101(c).

II.

RESPONDENTS PROVIDE NO DEFENSE OF THE LOWER COURTS' ERRONEOUS AND DANGEROUS INTERVENTION PRECEDENT.

Respondent KCMSD's best defense of the lower courts' denial of Petitioners' intervention is a rehash of the courts' "untimeliness" conclusions and a suggestion that such a denial constituted "harmless error at worst." KCMSD Br. in Opp. at 24-26. Respondent Jenkins offered no defense of the unfair, unlawful and dangerous precedent established below in excluding from direct participation in this case the only litigants who are actually paying the judicially-imposed property taxes in question. The denial of intervention contravened basic principles of due process and intervention law. *See NAACP v. New York*, 413 U.S. 345, 365-66 (1973). This decision also is fundamentally unfair. *See* Clark Pet. at 10-11.

Petitioners' participation in this litigation as *amici curiae* cannot cure these due process deficiencies. While the State of Missouri has maintained its philosophical opposition to court-ordered property taxation, State Pet. at 22-28, the State fails to promote the remedy advanced by Petitioners, Clark Pet. at 23-24, and accepted by the dissent below, *i.e.*, reversal of the court-ordered property tax and application of joint and several liability principles[2] to generate the revenue necessary to fund the ulti-

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2. Curiously, the Eighth Circuit majority accepted the State's joint and several liability as the appropriate revenue source to fund the anticipated shortfall in KCMSD desegregation revenue resulting from the income tax surcharge reversal. (Clark Pet. Appendix, A45.) The majority opinion even suggested the State's joint and several liability as a resource in the event

(Continued on following page)

mate desegregation judgment. (Clark Pet. Appendix, A51-A52.) Obviously, the State's interests squarely conflict with those of district property taxpayers when the issue of alternative desegregation funding arises.

These taxpayers, represented by Petitioners, have a right to their day in court to protect *their* property and advance *their* arguments regarding the fair and constitutional manner in which to fund desegregation of the Kansas City public schools.[3]

Footnote continued—

future School Board-initiated property tax increases prove insufficient to meet desegregation costs. (*Id.*, A41 n.18.) Why this remedy was not adopted as the appropriate, less drastic judicial alternative for *all* desegregation funding liabiiity was not explained. *See* Note, *Judicial Taxation in Desegregation Cases*, 89 Colum. L. Rev. 332, 343-45 (1989). Respondents have ignored the joint and several liability issue altogether, even though they acknowledge that a judicial taxation power is contingent upon the court's having "exhausted all other possibilities for obtaining [desegregation] funds. . . ." KCMSD Br. in Opp. at (i). *See* Jenkins Br. in Opp. at 61 ("no other alternative to assure actual implementation of the remedy").

3. While the lower courts' intervention decisions constitute bad policy and troubling precedent, Petitioners acknowledge that briefing and argument of this issue may not be necessary. As Petitioners have submitted in their Conclusion, *infra*, in the event the Court agrees to hear at least the judicial taxation question presented by the State of Missouri's petition in No. 88-1150, the Court could grant this Petition, summarily reverse the denial of intervention and permit these Petitioners—through consolidation, intervention or litigating *amici curiae* status—to represent their interests in the briefing and argument of the judicial taxation question.

III.

THE LOWER COURTS' JUDICIAL TAXATION DECISIONS CONTRAVENE FUNDAMENTAL PRINCIPLES OF CONSTITUTIONAL SELF-GOVERNANCE AND SIGNIFICANTLY DEPART FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS.

Respondent KCMSD would have the Court believe that "[n]o one in this case . . . ever contended that a federal court has taxing power." KCMSD Br. in Opp. at 22. KCMSD, relying on *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), describes the lower courts' action as merely an exercise of "the power to require a State or municipality to exercise *its* taxing power where the Constitution commands that exercise, or to set aside State law that precludes its necessary constitutional exercise." KCMSD Br. in Opp. at 22 (emphasis in original) (footnote omitted).

This disingenuous argument seeks to draw a distinction without a difference and clouds the judicial action actually taken below. If it looks like a judicial tax, and acts like a judicial tax, it's not simply an injunction. Even Respondent Jenkins properly framed the issue as being whether a federal district court has "the power" to effectuate a complete constitutional remedy "by directing that tax levies be increased in order to provide the revenue necessary to afford" constitutional relief. Jenkins Br. in Opp. at ii. Moreover, the Eighth Circuit majority, in revamping the court-ordered property "tax increases," confessed the need to "modify its future operation to more closely comport with limitations upon our judicial authority. . . ." (Clark Pet. App., A6.) Respon-

dents' defense of this breathtaking expansion of judicial authority misstates apposite constitutional law, particularly *Griffin*, and, further, contravenes fundamental tenets of representative government.

A. *The District Court imposed its own $1.95 property tax levy increase to fund the court's judicial remedy.* Respondents fail to address the constitutionality of the $1.95 school district property tax levy directly imposed by Judge Russell Clark in his September 15, 1987 order. (App., A82.) This judicial levy, which has resulted thus far in the collection of over $50 million in new taxes,[4] occurred through judicial fiat and not as a result of an injunction authorizing local officials to exercise *their* taxing discretion. Judge Clark raised the levy from $2.05 to $4.00 per $100 assessed valuation. Local taxing authorities, including school officials, did nothing. Certainly, the voters had no say.

B. *The Eighth Circuit's modification of the property taxation scheme is a fiction that continues to contravene constitutional principles.* The Court of Appeals' majority panel revision, permitting the Kansas City School Board *carte blanche* in setting future—even annual—levy increases, only exacerbates the unrepresentative nature of the tax. To say that the federal trial court "will be removed from the process of setting the levy" (App., A42) is simply not true. The District Court still will be empowered to set the maximum levy (*id.*), which, as the State correctly notes, State Reply Br. at 9 n.11,

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4. Approximately $18 million of the court-ordered property taxes have been paid under protest by thousands of local taxpayers pursuant to state law. *See* Mo. Rev. Stat. Section 139.031. These protested sums are situated in interest-generating escrow accounts overseen by the property tax collector, Jackson County. Taxpayers will seek a refund of these taxes in the event the court-ordered levy is invalidated.

will be the District Court's idea of the minimum levy necessary, regardless of future School Board action. In addition, how can the School Board be deemed independent of the District Court when the Board's every act, including the setting of the tax levy, is supervised by the court-appointed Desegregation Monitoring Committee and, ultimately, the District Court itself?[5]

C. *A federal court's power to impose property tax increases, for any purpose, was not "long ago settled."* Without question, the proper interpretation of the constitutional principle established by this Court in *Griffin, supra,* is the key issue for review. Yet, throughout Respondents' elaborate discussion of judicial taxation "precedent,"[6] no one distinguished the enlightening analysis set forth in *Moses Lake Homes, Inc. v. Grant County,* 365 U.S. 744

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5. The modified ruling makes a bad (and unconstitutional) situation worse. Instead of a $1.95 levy increase in effect for five years, as the District Court had ordered, the Eighth Circuit modification permits the School Board to obtain from the trial court, without voter approval, a "reasonable" levy increase each year *ad infinitum.* School district officials are not shy about seeking such court-ordered increases, either. School officials were unable to obtain approval of an additional $.23 increase to go out in last fall's tax bills only because the Eighth Circuit's mandate had been stayed and the trial court was without jurisdiction to act. The KCMSD has recently announced a $25 million "collaborative plan" for increased teacher salaries. Because this expenditure is not included in projected desegregation and operation budgets, the cry has gone out for more court-ordered tax increases. Without this Court's intercession, Kansas City taxpayers will be looking directly into a "black hole" of politically unaccountable and unchecked judicial tax assessments.

6. Respondents' reliance on nineteenth century Contract Clause decisions to justify the court-imposed taxes here is misplaced. In those mandamus cases, the federal courts ordered municipalities to levy taxes to satisfy bond default judgments. A significant factor in these decisions was the conclusion that "when the legislature of a state authorizes a county or city to contract a debt by bond, it intends to authorize [the local government] to levy such taxes as are necessary to pay the debt. . . ." *United States ex rel. Ranger v. New Orleans,* 98 U.S. 381, 394 (1879). No such intention is presumed or established by the judicial taxation scheme at issue.

(1961), a decision rendered just three years before *Griffin*.[7] Petitioners cited this authority for its holding that "Federal courts may not assess or levy taxes. Only the appropriate [local] taxing officials . . . may assess or levy taxes . . . and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials is or is not a valid one." 365 U.S. at 752.

The *Moses Lake Homes* precedent, and its self-imposed limitations on a judicial tax levying function under Article III, were recently reaffirmed by this Court in *Davis v. Michigan Dep't of Treasury*, No. 87-1020 (U.S. March 28, 1989), where the Court concluded that state income tax legislation favoring retired state and local government employees over retired federal employees violated principles of intergovernmental tax immunity. *Id.*, slip op. at 13. In its remand instructions, the Court stated that the appellant's claim could be resolved either by extending the tax exemption to retired federal employees or by eliminating the exemption for retired state and local government employees. However, the *Davis* Court noted "[t]he latter approach, of course, could be construed as the direct imposition of a state tax, a remedy beyond the power of a federal court." *Id.* at 13-14 (*citing Moses Lake Homes, supra*, 365 U.S. at 752).

Indeed, as the original constitutional analysis provided by Petitioners points out, *see* Clark Pet. at 13-23, and as the *Davis* decision reconfirms, neither our Constitution nor 200 years of Supreme Court precedent authorize a federal court to directly impose a local property tax in-

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7. Seven of the nine Justices who joined in the *Griffin* opinion had joined in the *Moses Lake Homes* opinion in 1961. The expansive *Griffin* construction advanced by Respondents and decreed by the lower courts is flatly contradicted by the restraint-oriented philosophy permeating the *Moses Lake Homes* analysis.

crease. This Court now has the opportunity to more clearly establish the limitations on the federal judiciary's power to order tax increases for any purpose. If left unchecked, the Eighth Circuit's decisions, and the analyses employed therein, will serve as a springboard for further instances of court-ordered taxation to generate revenue streams for the funding of constitutional remedies.

CONCLUSION

This Court should grant this Petition for Writ of Certiorari and order argument on the questions presented. Alternatively, in the event this Court issues its writ of certiorari in *State of Missouri, et al. v. Jenkins, et al.*, No. 88-1150, Petitioners pray this Court (*i*) grant the Petition herein, (*ii*) summarily reverse the intervention decision reached by the Eighth Circuit below, and (*iii*) consolidate this action (No. 88-1194) with the State of Missouri's action (No. 88-1150) for briefing and argument of the second question presented by these Petitioners and the State of Missouri, *viz.*, whether a federal court has the power under the Constitution to "lay and collect Taxes."

Respectfully submitted,

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April 6, 1989